

UNITED STATES
v.
FRED AND EILEEN GARNER

IBLA 76-609

Decided April 18, 1977

Appeal from decision by Administrative Law Judge Harvey C. Sweitzer declaring placer mining claims null and void for lack of discovery. Colorado 513.

Affirmed.

1. Mining Claims: Discovery: Generally

A valuable mineral deposit is an accumulation of a valuable mineral in such quantity and such quality that a person would be justified in expending his time and means in a reasonable hope of developing a valuable mine.

2. Mining Claims: Discovery: Generally! ! Mining Claims: Hearings! ! Mining Claims: Withdrawn Land

Where land occupied by a mining claim has been withdrawn from operation of the mining laws, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as of the date of the hearing.

3. Administrative Procedure: Burden of Proof! ! Mining Claims: Contests ! ! Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of no discovery, it assumes the burden of going forward with sufficient evidence to establish a prima facie case; then the burden shifts to the claimant to show by a preponderance of

the evidence that a discovery has been made and still exists within the limits of the claim.

4. Administrative Procedure: Hearings! ! Mining Claims: Hearings

The Government has established a prima facie case when a mineral examiner testifies that he has examined a mining claim and has found the mineral values insufficient to support a finding of discovery.

5. Mining Claims: Discovery: Generally

In applying the prudent man test of discovery, the cost of extraction, processing and transportation to market of the recovered mineral must be considered because these costs bear on whether a person of ordinary prudence would be justified in the further expenditure of his time and means to develop a valuable mine.

6. Mining Claims: Patent! ! Patents of Public Lands: Generally! ! Secretary of the Interior

The Secretary of the Interior is not authorized to issue a patent to a mining claim until he is satisfied that the requirements of the law have been met.

APPEARANCES: William G. Waldeck, Esq., Grand Junction, Colorado, for appellant; A. Walter Wise, Esq., Office of the General Counsel, U.S. Department of Agriculture, Denver, Colorado, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Fred Garner and Eileen Garner have appealed from a decision by Administrative Law Judge Harvey C. Sweitzer dated April 14, 1976, which declared the Fred and Eileen, Leadville Nos. 1 and 2, Garner Nos. 2, 4 and 5 placer mining claims null and void for lack of discovery of a valuable mineral deposit as of the time the lands covered by the claims were withdrawn from mineral entry. The two Patty Jo, Patty Jo No. 2 and Garner No. 6 placer mining claims were declared abandoned and therefore invalid, pursuant to stipulations entered into by counsel for contestant and contestees.

The Leadville and Garner groups of claims were located August 10, 1953, with the Garner No. 5 being amended June 26,

1970. ^{1/} The Fred and Eileen claim was recorded June 29, 1959. All of the claims are situated within the San Isabel National Forest, in secs. 31 and 32, T. 10 S., R. 80 W., and secs. 5, 6, 7, and 8, T. 11 S., R. 80 W., 6th P.M., Lake County, Colorado. All the land occupied by the contested mining claims has been withdrawn from mineral entry, in a series of orders dated February 14, 1963, June 3, 1969, and September 10, 1971, in connection with the Frying Pan! Arkansas Project, Bureau of Reclamation.

At the hearing, charges in the contest complaint were reduced by stipulation of counsel to three only:

No valuable mineral deposit has been discovered within the limits of any claim.

No valuable mineral deposits were discovered within the limits of any claim while the land therein was subject to appropriation under the United States mining laws.

The lands within the limits of the claims are non! mineral in character.

Appellants direct their appeal only to the question of validity of the Garner No. 5 claim, contending that the Administrative Law Judge erred as a matter of law and contrary to the evidence in his conclusion that the Garner No. 5 claim lacked a discovery of a valuable mineral deposit on June 3, 1969, the time the land was withdrawn from mineral entry; that the Judge erred in assigning the value of \$42.75 per ounce as the price of gold; and that the Judge erroneously utilized "proven profitable marketability" test instead of the test of "reasonable prospect of developing a paying mine," based on a large! scale continuous operation. We are not persuaded by the appellants that the Judge erred in his decision.

We have reviewed the record and agree with the summation of the probative evidence and testimony relating to the Garner No. 5 placer mining claim which Judge Sweitzer set out in his decision. For convenience, we repeat it here:

Warren C. Roberts testified on behalf of Contestant with respect to the Garner No. 5 claim. He has a Master's degree in geology and has been a mineral examiner with the Forest Service since 1955. Since then,

^{1/} Fred Garner had filed application C 9324 on August 5, 1969, seeking patent to the Garner No. 5 Placer mining claim.

he has examined numerous placer claims in Colorado and surrounding states. He examined the Garner No. 5 claim on August 9, 10 and 11, 1971, and again on June 29, 1972, in the company of contestee Fred Garner; and by himself on June 30, July 26, and September 6, 1972.

Mr. Roberts identified Exhibit 7 as a sketch to approximate scale showing the claim and various other features, including ". . . the workings and the drill holes pointed out to me by Mr. Garner where most of the work had been performed on the claim." (Tr. 116) He testified that the claim occupies a position over an area of glacial drift or glacial till. For this determination, he said he relied on publications as well as his own examination. In his opinion, the glacial nature of the area would not cause substantial concentration of heavy metals, except he conceded that the area of excavation on the claim was indicative of a concentration of gold in that area. He expressed the view that the areas in the general proximity of the claim which had been gold producers in past years differed from the claim in that the geologic evidence indicated the occurrence of streams creating a concentrating effect, which he did not believe existed respecting the majority of the Garner No. 5. However, he did say with regard to the claim that there are "intermittent stream channels" and that in the northeast corner there was evidence of a flood plain. (Tr. 120) He described the nearest point of the closest producing property (Derry Ranch) as about one! half mile distant from Garner No. 5, and said the last production therefrom was about 1950. He said that property had produced almost \$2! million of gold.

Asked whether it might be geologically inferred that gold existed on Garner No. 5 "due to the fact that over \$2! million of gold was produced on the Derry Ranch, less than a half mile away" (Tr. 122), Mr. Roberts responded:

Geologic inference would lead us to believe that there may be gold on the Garner No. 5 Placer, but it doesn't lead us to believe that it is an economic deposit. That would take further testing to find that out. (Tr. 123)

He characterized the difference between the claim and the past! producing, half! mile distant property (Derry Ranch) in the following words:

. . . [T]he material [on the Garner No. 5] is glacial in origin, and very little reworking and sorting by water . . . [whereas] the material from the Derry Ranch is what we call alluvial. It is water transported, water deposited, sorted material. That on the Garner No. 5 Placer is not, except for that portion that I spoke of already. (Tr. 123)

Mr. Roberts described the principal workings on the claim on his visit in August of 1971 to consist of the "prime" excavation pit and a series of drill holes. The pit and drill holes are illustrated on Exhibit 7 and in part on Exhibit 8, the latter being a detailed sketch of the southeast corner of the claim.

In August of 1971 he took ten samples from the prime excavation pit because, he stated, that was the area Mr. Garner had indicated to be his point of discovery, and also that was the area designated as the discovery point in the claim's application for patent. He labeled them "W.C.R. #1" through "10" inclusively. He testified in effect that these were channel samples taken from representative points at various levels on the walls of the pit, and that each consisted of 1/150th of a cubic yard; also that his sampling procedure was recognized by his profession and in the mining industry as a proper method of evaluating placer materials. He took three similar samples at different representative levels ("W.C.R. #11" through "13", inclusive) from a 15! foot shaft Mr. Garner dug with a backhoe at the location of "Drillhole #2" (northerly of the pit) because he said that location contained the highest gold assays in samples previously taken by Mr. Garner.

Mr. Roberts said that on his return to the claim in June of 1972, he encountered Mr. Garner and a helper processing some 200 yards of material at the plant located 9/10ths of a road mile, 1/2 straight line mile, from the southeast corner of the claim. (The plant was in the vicinity of a mobile home situate on the Derry Ranch. As testified later by Mr. Garner, he and his wife, the other contestee, lived in this mobile home.) This material had been removed from a new pit (identified as "Pit 2") situate about 20 feet easterly of the "prime" excavation pit. At that time, its dimensions were about 20 feet wide and 62 feet long, with an average depth of 6-1/2 feet (later increased to 12 feet). He observed the "run" (processing) and "helped point out the course

[sic] pieces of gold, some of which were nearly the diameter of a pencil erasure [sic]." (Tr. 135)

Mr. Roberts thereafter took samples from various elevations on the walls of Pit 2 (labeled samples "W.C.R. 14" through "21", inclusive, "24" and "25") and he testified to the effect that they were taken in a manner similar to that employed regarding W.C.R. 1 through 10. 9/

Mr. Roberts' testimony was that on June 3, 1969, the date of withdrawal of the land covered by the claim from mineral entry, the value of gold was \$42.75 per ounce. On that basis, he calculated the values per cubic yard of the gold represented by the several samples, illustrated on assay reports. (Exs. 10 through 12) He stated he also included the values of silver "... that normally or generally occurred in their fineness of .223 [except that] in these lower values where I have dropped below 50 cents for gold, silver comes out zero because the value is in the third decimal place and does not enter into it." (Tr. 148-49) He evidently felt gold and silver were the only minerals for concern. (E.g., Tr. 135-36) His computations ranged from extremes of \$.01 per yard (Sample "W.C.R. 3" shown as .08 total gold milligrams on Exhibit 10) to \$5.82 per yard (shown as Sample "W.C.R. No. 2" containing 35.32 total gold milligrams on Exhibit 10). His calculated average of all the samples demonstrated by Exhibits 10, 11 and 12 was \$.83 per cubic yard. 10/

9/ Exhibits 7 and 8, and certain limited testimony, also indicate that he took samples "W.C.R. 22" and "23" from a bulldozer trench near the northeast corner of the claim and "W.C.R. #26" from a point some 30 feet or so from the northwesterly edge of the "prime excavation pit." The witness indicated he intended to give further testimony about these samples (e.g., Tr. 137, 150), but evidently failed to do so.

10/ The assay results in total milligrams of gold per sample! ! and the Roberts' computed value per cubic yard on the bases of each sample pan representing 1/150th of a cubic yard and gold being valued at \$42.75 per ounce! ! are as follows:

From the westerly wall of the "prime excavation pit":

W.C.R. # 1,	6.65 mg.,	\$1.10
2,	35.32 mg.,	5.82
3,	.08 mg.,	.01
4,	.10 mg.,	.02

The witness expressed the opinion that at \$.83 per cubic yard, "several million yards of material . . . would be necessary in order to have an economic operation." (Tr. 151) He also advised that the fire assay results shown on Exhibits 10 through 12 would be expected to show higher values than could be recovered in a commercial operation. Although he indicated the sampling

fn. 10 (continued)

5,	.11 mg.,	.02
6,	.62 mg.,	.10
7,	10.83 mg.,	1.78
8,	3.27 mg.,	.54
9,	5.45 mg.,	.90
10,	23.54 mg.,	3.87

(Additionally, witness McIntosh took a sample from an unspecified point in the pit which, based on each sample pan representing 1/180th of a cubic yard and a value of \$45.00 per ounce for gold, he computed to a value per cubic yard of \$.08; (see Exhibits 4 and 5, Tr. 60).

From "Drillhole No. 2":

W.C.R. # 11,	2.63 mg.,	\$.43
12,	2.83 mg.,	.46
13,	6.56 mg.,	1.09

From "Pit 2":

Westerly side wall:

W.C.R. # 14,	4.35 mg.,	\$.73
15,	11.28 mg.,	1.86
16,	.12 mg.,	.02
17,	.45 mg.,	.07
20,	1.18 mg.,	.20
21,	2.82 mg.,	.46

Southerly end wall:

W.C.R. # 18,	.35 mg.,	\$.06
19,	.69 mg.,	.11

Near northerly end wall:

W.C.R. # 24,	1.15 mg.,	\$.18
25,	.98 mg.,	.16

From trench near northeast corner of claim:

W.C.R. # 22,	10.72 mg.,	\$.83 (this
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evidently consisted of two pan samples, thus
computed to represent 1/75th of a cubic yard.
(See Tr. 150)).

23,	.18 mg.,	\$.03
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From a point some 30 feet westerly of northwest corner of prime pit:

W.C.R. # 26	1.32 mg.,	\$.21
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method he utilized was a "fair and representative" sampling procedure to determine the gold values on the claim, yet he said a much larger bulk sample would be a better procedure "by far." (Tr. 151)

Mr. Roberts gave his opinion, as follows, respecting the extent of the mineralization on the Garner No. 5 claim:

Based on my observations, based on my testing, based on what I know of the property through work I have done on it, I feel that the values are pretty much concentrated in the southeast corner and do not extend through the claim with any uniformity or any regularity. There is an indication through the sampling that the farther one samples from the wall, west wall of the prime excavation and Drill Hole No. 2, there is a general decrease in value. This is the basis upon which I feel the concentration is in that area of the prime excavation.

I also feel that the amount of yardage available that may contain gold possibly in economic amounts, and the only way to determine this would be through a larger testing program of drilling or excavation throughout the property, I believe the prime amount of material is pretty much confined along the east side of the claim. [This conclusion is] [b]ased on the material that I have observed as far as the workings, the test pits that we have observed; based on the fact that this is a lower elevation portion of the claim where there has been some indication of stratification of material indicating the possibility of material having been worked by water for the sorting that I explained earlier. (Tr. 152-153)

He reiterated his opinion that there is not continuity of mineralization because the material upon which the claim was located is glacial in origin, thus distinguishing it from ". . . a lead that one could follow as one might expect in water! deposited material." (Tr. 154)

Mr. Roberts expressed the view that a prudent man would not be justified in the further expenditure of his

labor and means with a reasonable prospect of success in developing a valuable mine on the claim even as of the hearing date because "... the values decreased from this one point where we have found high values, and secondly, I think there is not sufficient yardage to propose a large operation or a continuous operation. I feel that the values to the north are going to decrease to an extent that it wouldn't be possible to operate economically at all." (Tr. 155) He testified to the effect that a prudent man would be even less justified as of the withdrawal date of June 3, 1969, because then the price of gold was less than it was at the hearing date.

Cross! examination emphasized that Robert's opinion respecting the origin of the placer deposit on the claim (glacial) appeared to differ somewhat from that of McIntosh. Also, he agreed that a large degree of water concentration of a placer deposit is not always essential to a commercial deposit; further, that the Garner No. 5 lies between the source of gold and the deposition which has been economically exploited in the past. He acknowledged that his 26 samples from the claim utilized in total approximately only one! sixth of a cubic yard of material, although he emphasized his view that the method he used was a proper one for checking the claim. He agreed that values had existed in the so! called prime excavation pit sufficient to have been profitably recovered. He also acknowledged having written a report resulting from his examinations bearing the statement, "It may be that the greatest concentration, the richest portion of the gold carried by the glacial drift is confined just to that immediate area where the main working has been operated, and that there are only a few more yards . . . of material carrying the higher values that warrant recovery with a reasonable expectation of making a profit." (Tr. 168-69) He agreed also that his opinion respecting the prudent man question would be altered if it turned out that the material remained at an economic level if mining progressed to the north and to the west rather than decrease in value as his evaluation suggested it would do.

During redirect examination, Mr. Roberts explained the sentence in the report as quoted hereinabove with the following language:

The intention in the way that this was written, and what I had in mind was that according to two or three samples that I got

from the west wall of the prime excavation indicated that there was gold value at that point, and when I said that there were only a few more yards of material, I was confining it to the vicinity of the west wall of the prime excavation. I was not trying to imply that these values were extending throughout the other portion of the claim and would justify a large operation in the hope of making a profitable operation. Only this portion that was right there by the west wall, that whoever could recover the gold from that point, probably could do it at an expenditure less than what the value of the gold would be at that point. But I was not trying to imply, nor did I mean to imply that this would extend so far out in the claim, westerly from the prime pit, that this would indicate a discovery. I did not mean that. Only values that existed at that point." (Tr. 176-77)

He calculated the prime excavation pit to have contained some 843 yards of material. With respect to whether this amount of yardage, assuming it to have values of \$5.00 per cubic yard, could be mined at a profit, he opined "not if the values were confined only to that pit. If that was the extent of the \$5.00 gravel. The 8! hundred yards could not make it a profitable operation, particularly if you were in the position of buying equipment to operate that 8! hundred yards." (Tr. 177-78) He felt that the two highest samples ("W.C.R. 2" and "10") ran disproportionately high to the values shown in the remaining samples.

Contestee Fred W. Garner testified to extensive work experience, beginning in about 1924 in construction work, including earth moving and excavation. He also told of many years work in placer mining. He established a longstanding familiarity with the area on which the claims are located. He illustrated his knowledge of their location on the ground as depicted on the Exhibit 2 quadrangle.

With the help of Exhibit HHH, a coordinated set of Geological Survey quadrangles, he depicted the location of the Garner No. 5 Placer, the "prime excavation pit" (near the claim's southeasterly corner), the "Garner Mill" (about three! quarters of a mile southeasterly of the claim), and the "derry dredge tailings" (about one

and one! half miles easterly of the northerly end of the claim). He explained that during the 1930's and 1940's, he helped work producing mining properties in the vicinity of the "derry dredge tailings"; also, that he actually resided with his wife (the other contestee) on the land that encompassed that producing property in a mobile home between about 1964 and 1974. While he was working in the area, and also while he lived there, he engaged in considerable prospecting, and he has been on the claims almost daily since about 1959, and has done much work on them during these years.

According to Mr. Garner's testimony: During the late 1950's, he conducted drilling of 30 to 35 8! inch core drills on the Garner No. 5, and Leadville Nos. 1 and 2; the "prime" pit excavation was commenced in 1966; and he accepted Roberts' estimate of a total of 800 or so yards removal as of 1972; from this a total of about one pound, one and a half ounces of gold was recovered, the pound being sold to the Denver mint; subsequently, an additional 1000 yards, more or less, were removed. Pit "No. 2" was excavated in about 1972; from this he removed an estimated total of a pound to a pound and a half of gold; he could not even estimate the total yardage removed from Pit "No. 2." He excavated a much smaller pit with a track loader near the northeast corner of the claim; 11/ this needed more exploratory work. He also did some additional excavation and hand prospecting on various parts of the claim; these resulted in findings of mineral, the amounts of which he did not define. Before he would move his placer operation from its location in the northeastern portion of the claim to other areas of the claim, he would wish to perform further exploration of those areas since he does not presently know the quantity or quality of mineral in the other areas.

He located the claims, he said, because he "found valuable minerals." (Tr. 206, 207) He explained prospecting he had done in order to come to this conclusion, including his panning and his utilization of colors (fragments of gold observable with his naked eye) respecting his determination that he had discovered valuable mineral.

11/ This is the pit from which Roberts obtained his samples "22" and "23".

Concerning the results from his core drilling, Mr. Garner explained his method of obtaining and processing the material and having it assayed. He testified that he gained valuable information concerning the claims' mineral content from the results of this core drilling in the 1950's, but that at the time of the hearing, he was not able to identify results from any specific drill hole. However, he did state that on the claims he drilled, which were the Garner No. 5 and Leadville Nos. 1 and 2, that he found materials in such quantities that, from his experience in placer mining, caused him to believe it was a valuable mineral.

Thus, he gave as bases for his opinion that valuable minerals existed on the claims, surface prospecting with respect to all the claims and, in addition, the results of core drilling on the Garner No. 5 and Leadville Nos. 1 and 2 claims. While his testimony was unclear with respect to whether his opinion was that a prudent man would be justified in expending time and money on the Fred and Eileen and Garner Nos. 2 and 4 claims, he reiterated that with respect to the Leadville Nos. 1 and 2 and Garner No. 5, the core drilling and surface prospecting caused him, as a prudent miner, to definitely believe that a sufficient finding was made to justify further expenditure of his time and money with reasonable expectation of developing a paying mine.

Mr. Garner explained scenes on and around the claims by the use of various slide films taken in 1972, designated Exhibits A through T, inclusive. They also show the "derry dredge tailings" and the mobile home in which he lived in the proximity of the claims from 1964 until May of 1974. They showed a mill and pond, a "mechanical gold pan," a processing plant, and related structures which he said he utilized in his Garner No. 5 Placer operations in the 1950's and 1960's. He also showed various photographs of "gold nuggets" from the Garner No. 5.

Mr. Garner displayed various vials containing gold which he explained was removed and processed from the Garner No. 5. Mr. and Mrs. Garner sold similar vials containing gold during mining celebrations held in the Leadville area. In this connection, the following exchange on direct examination took place:

Q. You have found that you have a market from these tourists that want to buy samples of placer gold in its natural state?

A. Yes, sir.

Q. Do you have any trouble selling this gold?

A. None at all.

Q. Can you sell as much as you produce if you wished to?

A. Yes, if I wished to sell it all.
(Tr. 244-45)

Mr. Garner advised that he had sold the vials for \$3.00 each, and he computed that, inasmuch as each vial contained between 3-1/2 and 4-1/2 grains of gold, that this would market at \$300 to \$400 per ounce. He also told of selling several vials containing greater amounts for larger sums. He estimated that the vials displayed at the hearing could be sold for a total of about \$10,000 to tourists. He said all the gold in the vials was obtained from the two pits ("prime" pit and pit "No. 2") on the Garner No. 5, or from the area between the pits. On cross! examination, he indicated he actually received a total of about \$ 750 for souvenir gold in 1973 and lesser amounts in 1970, 1971 and 1972. He said he had not sold any as souvenir gold prior to 1970.

He stated that since the time Mr. Roberts had examined the property, he had removed approximately 1,000 additional yards of materials from the northerly and westerly portions of the "prime" pit. When asked whether the gold recovered from the 1,000 yards was in quantities enough to pay the costs of operation plus a profit, his expression was that ". . . it was a bonanza." (Tr. 251) Elsewhere, when asked whether the amount of gold removed from this 1,000 yards would be "as much as a pound," he responded it would be "far more than a half! pound," but that he didn't know just how much; that, "I don't have it all cleaned up. I can't give the exact amount." (Tr. 316-17)

In reiterating that since the time Roberts observed the "prime" pit with 800! plus yards removed, he had

removed more than that amount again from that pit, the following exchange took place:

Q. Mr. Roberts testified that in his opinion there was very little, if any, additional pay ore that would go north and west from your pit at the time he examined it. Did you hear him make that statement?

A. Yes.

Q. Has your experience proved him to be correct or incorrect?

A. It is incorrect.

Q. How has the material that you have removed going in a westerly direction and northerly direction compared with the grade of material taken from the pit itself as compared (sic) by Mr. Roberts.

A. It has appeared to be richer. (Tr. 252)

* * *

Q. . . . The question I have asked you is whether or not the average of the approximate 1! thousand tons of material which you have mined to the west and to the north of the pit depicted upon Exhibit G-8 and designated with a[n] S under it, whether or not that material averaged on the average over the entire 1! thousand yards a value sufficient to be produced by you at a profit?

A. Yes, sir. (Tr. 255)

Direct examination of Mr. Garner concluded with the following expressions of opinion:

Q. . . . With respect to the Garner No. 5, will you state whether or not on and before June 3, 1969, you had

discovered upon the Garner No. 5 a deposit of valuable mineral which you had been able to demonstrate by mining it, would be capable of extraction at a profit?

A. No doubt in my mind whatsoever.

Q. Now I am going to ask you a second question with respect to the same claim. On June 3, 1969, had you theretofore discovered mineral in such quantities and in such grades as would justify a reasonably prudent person to expend his money and labor with a reasonable expectation of developing a paying mine?

A. Yes, sir. (Tr. 258)

* * * * *

Asked why he caused production of only two to three pounds of gold from the Garner No. 5 during the 20 years since claim location (1953), although he had the equipment to produce, he responded that he was awaiting higher gold prices before further production. He emphasized that this area of the "prime" pit and Pit "No. 2" does not need to be further explored because he "know[s] what is at the pit area . . . [w]ithout further drilling or testing or whatever. I know it is commercial quantity for a great sizable amount of yards in that particular area." (Tr. 320)

Mr. Garner was questioned concerning Exhibit GGG, "An Appraisal of the Garner No. 5 Gold Placer Claim Ownership, Location and Access," prepared by E. V. Reinhardt, consulting engineer (who was subsequently called to testify on behalf of contestees). Specifically, he was asked about a discussion in the report of a small scale weekend operation in which an estimated 50 yards of material would be mined and treated in a weekend operation plus some evenings during the same week, and he responded that only one man would be required for this process (although his testimony in this respect appears qualified, as is discussed at p. 43, infra).

Mrs. Eileen Garner, wife of Fred Garner, and the other contestee in the case, testified that the large

number of souvenir vials of gold still in their possession could be readily sold if they wished. She also testified to having a good knowledge of the Garner No. 5 claim and also the other claims, based on going to them almost daily from about 1959 to 1964 and also at various other times, both before and after those dates. She helped her husband in the placer operations on the claim. She displayed a jar containing particles of free gold which she removed with tweezers as the material was processed. Because of the elevation (about ten thousand feet) and inclement weather in the area of the claim during part of the year, the working season has been primarily in the summer.

William J. Arcieri, testified to being a resident of the town of Leadville and to having an Associate Science degree in physical science and one in mathematics. He also testified to having an Electrical Engineering degree and some educational qualification in economics. He has viewed the placer operations of the Garners on the Garner No. 5 claim since the summer of approximately 1969. He testified that the mechanics of the process utilized by the Garners to extract gold from the materials is a workable operation. Also, that he has assisted the Garners in weighing placer gold to be placed in their various vials. He said he has computed the cost of operation and recovery of the Garners and gave the opinion that some of the "runs" they have mined yielded a profit, although others were not profitable; nevertheless, that the average of the runs that he had seen were profitable.

Mr. Arcieri stated he had observed "very many runs" on the property and he discussed "one of the better runs" (Tr. 369) he observed "from start to finish" (Tr. 345) "in the early '70's" (Tr. 354) in which a total of 75 cubic yards were run resulting in a gold recovery of one ounce per 12 yards, or 6.25 ounces for the total 75 yards. Testifying that at that time the value of gold was approximately \$64 per ounce, he computed the gross value thus recovered at \$400. He was of the opinion that it cost the Garners "approximately 60 cents a yard to move the material from start to finish through the trommel." (Tr. 354) He computed that, therefore, it cost them \$45.00 to process this 75 yards.

Mr. Arcieri's opinion that Mr. and Mrs. Garner could process the materials from the claim at a cost of 60 cents per yard included "[a]ll of those items necessary to run gold from the pit through the trommel to

recovery." (Tr. 355) He acknowledged that in computing this figure, he had made no allowance for the Garners' labor, nor for equipment depreciation or maintenance. He agreed that his cost calculation of 60 cents per yard was based on the "unique circumstances that Mr. Garner finds himself in." (Tr. 369)

He testified to various photographs taken in the early 1970's showing the equipment utilized in the placer operation and also various amounts of gold recovered therefrom. He displayed jewelry which he had made from gold given him by Mr. Garner and said that he would make more if Mr. Garner would release more gold to him.

E. V. Reinhardt is a registered professional engineer in the state of Colorado. He graduated cum laude in 1928 from Harvard University with a degree in geology and subsequently took additional schooling in this field. He has had extensive experience in geology and mining matters, the majority of it in underground, rather than placer, mining. His studies of the Garner No. 5 claim resulted in the appraisal thereof identified as Exhibit GGG, which contains the following "Conclusion":

With a gold price of \$180.00 an ounce, the Garner No. 5 Placer will pay handsome dividends even with the inflated costs of labor, material and supplies. Should inflation continue over an extended period of time, the gold price should also inflate in proportion or more rapidly than labor and material. It may be expected that this placer can be worked profitably until it is exhausted. As the plan would be to work the placer at the rate of 500 yards a day and, as the working season per year is about 180 days, the life of the placer would be about seven and one-half years.

Further, there is a strong probability that continued working of the placer may lead to a large and rich vein which would sustain an underground mining operation for many years. (Exhibit GGG, p. 9-10)

Additional pertinent statements of Exhibit GGG, and on which elaboration was given in Mr. Reinhardt's testimony, are the following (headings are as in the Exhibit):

* * *

Geology

. . . [T]he entire placer was probably fed from a large, north! south vein some distance up the hill from or west of the Garner pit
(Exhibit GGG, p.4)

* * *

Nature of the Examination

Knowing the errors that are likely to creep into a report based on a few small samples, arrangements were made with Mr. Garner to mine about one hundred fifty cubic yards of gravel from the pit under my supervision. 12/

This was accomplished July 13th and 14th, 1974. I returned July 20th and 21st and watched a portion of this material run through the mill.
(Exhibit GGG, p. 5-6)

. . . This was loose, mined material and represented no more than 30 cubic yards in the pit. This was reduced to 90 pounds, dry weight . . .
. Two days were spent panning the sample down to about four pounds. . .

* * *

. . . [T]he gold recovered from [the] approximately thirty cubic yards of gravel was:

From panning	6.1324 grams
From amalgamation of	
tailings	5.0508 grams
Coarse gold from	
sluice box	<u>1.0308 grams</u>

12.2140 grams

[or 0.393 ounces]

12/ He testified that the 150 tons of material which were subjected to the test were taken from the north and west walls and bottom of the prime pit.

* * *

Taking . . . losses into consideration, the gold content in 30 cubic yards of material is at least 0.40 ounces (p. 6-7)

* * *

Value of the Gold

\$186.00 [the quoted value at the time of the 1974 Exhibit GGG appraisal] X .40 = \$74.40 worth of recoverable gold in 30 cubic yards of gravel or \$2.48 per cubic yard. (p. 7)

Available Yardage of Gold! Bearing Gravel

Mr. Garner had drilled about one hundred feet to the north, south and west of the pit, obtaining gold in all holes. . . . [I]t seems proper to state simply that gold is present in gravels extending for distances of one hundred feet north, south and west of the pit. As the gravels have been proved to a depth of fifteen feet without encountering bedrock, a depth of twenty feet does not seem [sic] unreasonable. Therefore, the following yardage may be calculated:

66 yards (N! S) X 33 yards (E! W) X 7 yards (depth) = 15,246 cubic yards. [The Exhibit also states a "probability" that the dimensions in yards might be 1300 (N! S) X 75 (E! W) X 7 (Depth) which would equal] 682,500 cubic yards which would gross at the present price of gold: \$2.48 X 682,500 = \$1,692,600.00. (p. 7-8)

* * *

Costs

. . . On Saturday and Sunday he [Mr. Garner] can mine and treat about 50 yards of gravel, using evenings during the week to separate the gold from the black sand. He and Mrs. Garner do all the work on the mine and mill; they use no more than 10 gallons of diesel fuel worth

about \$5.00 and the depreciation and upkeep of the equipment should not exceed \$10.00 per weekend. He, therefore, has an expense of about \$15.00 to produce \$200.00 worth of gold as he markets it.

If worked on a larger scale, the costs would rise

* * *

Capital investment per yard	\$0.22	
Labor per yard		0.51
Fuel and oil per yard		0.10
Depreciation, etc., per yard	0.10	
Supervision, etc., per yard	<u>0.25</u>	
Total expected cost per yard	\$1.18	

As the value at the present price of gold is \$2.48 per cubic yard, the expected net would be \$1.38 per cubic yard or \$941,850.00 in the placer. (p. 8-9)

Mr. Reinhardt expressed his opinion that the deposit was not glacial in nature. He characterized it rather as being a residual placer, defining this as:

. . . one that is formed close to the source, has not been reconcentrated by action of the moving stream, and more or less has good values right from grass roots right on down. (Tr. 388)

The only other "residual placer" with which he indicated familiarity is one in Nevada which he said was never placed into operation because of lack of proximity to water. He conceded that if the Garner No. 5 were glacial in origin its operation might not be profitable; but he reasserted his opinion that it is not a glacial deposit.

With respect to the question of whether he believed the deposit he sampled was capable of "economic commercial operation," he stated:

That it is extremely profitable the way Mr. and Mrs. Garner work it, and that if it is put on a larger really commercial scale, that it will still be profitable. Not as

profitable per cubic yard, but far more profitable because more cubic yards will be run through. (Tr. 385)

Mr. Reinhardt acknowledged his estimate of "682,500 cubic yards" included area additional to that on the claim, explaining that the "15,246 yard" figure was for the claim only. The additional projected yardage lay adjacent to, but off the claim. 13/ It was his opinion, then, that "if they are confined just to the Garner No. 5, that Mr. and Mrs. Garner had better continue to work it as they are at the present time. They can come out with handsome profits. But if they want to expand and put it on a really commercial basis, they are going to have to acquire more ground, both to the north and to the south." (Tr. 391-92)

He further explained, during cross! examination, as follows:

Q. So then, in fact, your \$1.18 figure would raise dramatically if you substitute 15! thousand for 600! thousand; isn't that a fact?

A. I wouldn't recommend going into a large! scale commercial venture, if that's all they are going to be allowed to mine, or if that's all they can find on the Garner No. 5. Now, there may be far more than 15! thousand tons, because I only extended it up the hill a few feet, and I think, as a matter of fact, that it goes up there two or three hundred feet.

Q. A further exploration would allow you to prove this?

A. Yes, that is correct. (Tr. 411-12)

Responding to the question of whether if the price of gold were \$42.75 an ounce as it was on the date of the withdrawal, rather than the \$186 utilized by his

13/ The additional yardage figure was not indicated to lie on any of the other claims included in this contest.

report, if his opinion as to economic feasibility would be changed, he answered:

If it were done on a large scale with a large capital expenditure, I would change my mind. If it were worked on a small scale by Mr. and Mrs. Garner at very little expense, I would not change my mind. It can still be worked profitably at \$42.50 a yard. (Tr. 395)

With respect to his "small scale" operation calculations, he stated he did not include expenses for capital investment because the Garners already have the equipment. Mr. Reinhardt agreed that if they didn't already have the equipment, i.e., that if they had to buy the truck, dragline, mill, frontend loader, pumps, and miscellaneous equipment, and including depreciation and repair service, that with the price of gold at \$42.75, "[i]f they had to start out from the very beginning, it would be nip and tuck whether they could make it or not, but in view of the fact that they have all the equipment, it is not nip and tuck." (Tr. 396) And he said his calculation on the small scale weekend operation was based on the assumption that the plant could remain where it is and would not have to be moved.

Asked whether he included the Garners' labor as an expense, he responded:

I haven't included the cost of their labor.

* * *

... I can't see any reason for including wages because the gold they would recover would be their profit, and the profit would be their wages. They don't have to pay themselves wages. (Tr. 418-19)

With regard to his projected "larger scale" operation, Mr. Reinhardt advised that the figure of \$150,000 for capital expenditure included in Exhibit GGG for the mill, pipelines, trucks and other equipment was based on a rough estimate. The following exchange then took place:

Q. Well now, I guess we have already concluded the large operation! ! and correct me if I am wrong! ! I guess we have concluded that the larger operation

would not be feasible because there apparently isn't sufficient yardage to merit the initial capital investment; is that true?

A. If more drilling were done, there might be enough of this placer proven on the Garner No. 5 so they wouldn't have to include off to the north and south. If more drilling were done, it is quite probable that it would extend far enough to the west so that the commercial operation could be set up.

* * *

Q. Do you believe a prudent man given the information he knows today would be justified in investing \$150! thousand in Garner No. 5?

A. Yes! ! no, let me back up just a little bit. A prudent man would do some drilling. He would perhaps spend five or ten thousand dollars drilling, at the conclusion of which he would then be justified in spending \$150! thousand. (Tr. 413-14)

The position of Mr. Reinhardt was clarified as follows:

Q. . . . Assuming the existence of the amount of ore that you can reasonably anticipate without further exploration activity, do you think that a reasonably prudent person would be justified in the further expenditure of his time and money with a reasonable expectation of developing a paying mine?

A. Of course, he would, by all means.

Q. Do you believe that the operation that you observed can be conducted by Mr. Garner and his wife at a profit?

A. It can be and has been. (Tr. 415-16)

Decision, pp. 10-29.

With regard to labor costs for such a small scale operation, the evidence suggests the removal and processing of 50 cubic yards of the placer materials would involve work all day Saturday and Sunday and on one or more evenings during the week. The evidence is unclear as to how many laboring persons would be involved in such an operation, and it is unclear regarding the cost or worth of the labor on an hourly or other basis. The brief filed for Contestant Forest Service declares at its page 16 that "the claimant admits . . . [this] would be a three! person operation," but I find no record support for this declaration. Mr. Garner speaks of it as constituting a "one man" operation, he evidently being that man, but then he goes on to seemingly indicate that Mrs. Garner would be working with him in the operation. (Tr. 289-90) Mr. Reinhardt's exhibit GGG at page 8 (and his testimony (Tr. 391-92, 403)) leaves it unclear whether he intends Mr. Garner only, or Mrs. Garner as well.

In any event, the absolute minimum of labor hours respecting the assumed 50 yards appears to be 20 (one person, eight hours on Saturday and again on Sunday, and four hours on a weekday evening). * * *

Decision, p. 43.

After a discussion of the law, the Judge concluded that, at the time the land embraced by the Garner No. 5 placer mining claim was withdrawn from mineral entry, and based upon the value of gold at that time, the evidence did not show that there was a reasonable prospect of profit sufficient to induce a prudent person to expend his means and time in attempting to reap a profit by extracting and marketing the mineral. He then held the claim null and void for lack of a discovery. We affirm.

[1] Under the general mining laws, 30 U.S.C. §§ 22, et seq. (1970), one who has discovered a valuable mineral deposit on land open to the operation of the mining laws may receive title to that land. We emphasize that discovery is the sine qua non for a valid mining claim. To constitute a discovery upon a mining claim there must be physically exposed within the limits of the claim minerals of such quality and in such quantity to warrant a prudent person in expending his labor and means with a reasonable prospect of success

in developing a valuable mine. United States v. Coleman, 390 U.S. 599, 602 (1968); United States v. Reynders, 26 IBLA 131 (1976); United States v. Gold Placers, Inc., 25 IBLA 368 (1976); Castle v. Womble, 19 L.D. 455 (1894). A valuable mineral deposit is one which has present economic value, that is, a deposit which can presently be mined, removed and marketed at a reasonable profit. United States v. Coleman, *supra*. Although the Department does not require proof absolute that a profit will result from mining operations, it does require that there appear to a person of ordinary prudence a reasonable prospect of such success. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-6 (1963); Cameron v. United States, 252 U.S. 450, 459 (1920); Chrisman v. Miller, 197 U.S. 313, 322 (1905).

[2] Where land occupied by a mining claim has been withdrawn from operation of the mining laws, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as of the date of the hearing. If, at the time the land was withdrawn from operation of the mining laws, the claim was not supported by a discovery of a valuable mineral deposit, the land within the boundaries of the claim would not be excepted from the effect of the withdrawal, and such a claim could not thereafter become valid even though the value of its mineral deposit increased due to a change in the market or because of the finding of additional mineral. United States v. Arcand, 23 IBLA 226 (1976); United States v. Fleming, 20 IBLA 83 (1975). See also United States v. Converse, 72 I.D. 141 (1965), *aff'd*, Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

[3] When the Government contests a mining claim on a charge of no discovery, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; then the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), *cert. denied*, __ U.S. __ (1976); United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959). Thus, it is clear that the mining claimant is the proponent of an order to declare his claim valid, so that, pursuant to the Administrative Procedure Act, 5 U.S.C. § 556 (1970), it is the claimant who bears the risk of nonpersuasion. Foster v. Seaton, *supra*; United States v. Arcand, *supra*; United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

[4] The Government has established a prima facie case when a mineral examiner testifies that he has examined a mining claim and

found the mineral values insufficient to support the finding of discovery. United States v. Arcand, *supra*; United States v. Hallenbeck, 21 IBLA 296, 300 (1975). The mineral examiner's conclusion must be based upon reliable, probative evidence, United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971), but he is not required to perform discovery work, to explore or sample beyond the claimant's current workings, or to conduct drilling programs for the benefit of the claimant. United States v. Arcand, *supra*; United States v. MacIver, 20 IBLA 352, 355 (1975); United States v. Wells, 11 IBLA 253 (1973); United States v. Grigg, 8 IBLA 331, 79 I.D. 682 (1972).

[5] It is clear that in applying the prudent man test, the cost of extraction, processing and transportation of the recovered mineral must be considered because these costs bear on whether a person of ordinary prudence would be justified in the further expenditure of his time and means to develop the mining claim. United States v. Coleman, *supra*; Converse v. Udall, *supra*; United States v. Heard, 18 IBLA 43 (1974). Such costs necessarily must include the amortization cost of the equipment used in the mining operations, even though the claimant by fortuitous circumstance has access to machinery at a cost less than the average prudent person would have to pay. See United States v. Heard, *supra*; United States v. Horn, 16 IBLA 211 (1974); United States v. White, 72 I.D. 522 (1965). Labor and equipment costs must clearly be considered in determining whether a mining operation has a reasonable prospect of success. There is no reason to consider the value of the labor of a locator or the use of his mining equipment any differently from that which he might hire. Either one must be taken into consideration in determining the likelihood of a profitable venture being established. See United States v. White, *supra*.

[6] The Secretary of the Interior is not authorized to issue a patent to a mining claim until he is satisfied that the requirements of the law have been met. United States v. New Jersey Zinc Co., 74 I.D. 191 (1967).

Our review of the record does not support the charges that the decision of the Administrative Law Judge is erroneous as a matter of law and not supported by the evidence.

Appellants argue that it was error for the Administrative Law Judge to utilize the figure of \$42.75 per ounce as the only value of gold which may be used in this case. They contend they anticipated gold would rise in price in the world market, so they did not sell all the gold they had mined prior to the date of withdrawal in 1969, and now offer the actual rise in the price of gold in the period from 1969 to 1974 as substantiation of their expectation. Additionally, they suggest that the sales of "souvenir" gold for amounts in excess of \$300 per ounce also supports their position.

The record does not show that the Garners sold any gold for more than the market price of \$42.75 prior to the time of withdrawal of the land in 1969. Application of the prudent man and the present marketability tests does not afford latitude to include mere speculation that substantial changes in the market place might occur. That the Garners sold small amounts of gold for inflated prices as "souvenirs" after the date of the withdrawal cannot be considered in any way as indicative of the value of the gold in 1969. We point out that the price of gold in the world market has fallen considerably from the \$186 figure set out in the statement of reasons as applicable in 1974. It has not been shown that the price of gold in the market place in 1969 was other than \$42.75 per ounce. The Administrative Law Judge correctly utilized that figure.

We do not recognize that the Administrative Law Judge conditioned his holding of no discovery on lack of proof of existence of proven mineral deposit capable of sustaining a large scale continuous operation. Appellants' evidence indicates that there is not enough mineral material on the Garner No. 5 claim to support a large scale operation and that costs of operations on the small scale possible on the single claim would probably exceed the value of the recovered gold. The Administrative Law Judge did not substitute "proven profitable marketability" for a "reasonable prospect of developing a paying mine." Appellants simply did not present enough credible evidence to overcome the Government's prima facie case of no discovery. United States v. Zweifel, *supra*; United States v. Springer, *supra*; Foster v. Seaton, *supra*; United States v. Bechthold, 25 IBLA 77, 82 (1976); United States v. Taylor, *supra* at 25; United States v. Gardener, 18 IBLA 175, 178 (1974). The claimants in an application for a mineral patent must prevail, if at all, upon the strength of their own case rather than upon the weakness of that of the Government.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge holding the Two Patty Jo, the Patty Jo No. 2, and the Garner No. 6 claims invalid because of

abandonment, and the Garner Nos. 2, 4 and 5, the Leadville Nos. 1 and 2, and the Fred and Eileen placer mining claims null and void for lack of discovery is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Joan B. Thompson
Administrative Judge

